

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

RUDOLPH PERRY,

Petitioner,

V.

PIERCE COUNTY SUPERIOR COURT,

## Respondent.

Case No. C05-5301

## ORDER DENYING CERTIFICATE OF APPEALABILITY

This matter comes before the court on the petitioner's Notice of Appeal. Dkt. 17. The court must consider whether to grant or deny the petitioner a Certificate of Appealability. *See* 28 U.S.C. 2253(c)(3). The court has reviewed the record herein.

## **I. PROCEDURAL HISTORY**

On June 10, 2005, U.S. Magistrate Judge Karen L. Strombom issued a Report and Recommendation, concluding that petitioner's habeas claims were unexhausted and that the petition should be dismissed without prejudice. Dkt. 7. On July 25, 2005, the court adopted the Report and Recommendation and dismissed the petition without prejudice. Dkt. 11. Petitioner has now filed a notice of appeal to the U.S. Court of Appeals for the Ninth Circuit. Dkt. 17. This notice of appeal is construed as a petition for a certificate of appealability. Dkt. 19. The response was due on October 31, 2005, but none was filed. *See id.*

## **II. STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY**

The district court should grant an application for a Certificate of Appealability only if the petitioner makes a “substantial showing of the denial of a constitutional right.” 28 U.S.C. §

1 2253(c)(3). To obtain a Certificate of Appealability under 28 U.S.C. § 2253(c), a habeas petitioner  
 2 must show that reasonable jurists could debate whether, or agree that, the petition should have been  
 3 resolved in a different manner or that the issues presented were adequate to deserve encouragement  
 4 to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 475 (2000) (*quoting Barefoot v. Estelle*, 463  
 5 U.S. 880, 893 n.4 (1983)). When the court denies a claim on procedural grounds, the petitioner must  
 6 show that jurists of reason would find it debatable whether the petition states a valid claim of the  
 7 denial of a constitutional right and that jurists of reason would find it debatable whether the district  
 8 court was correct in its procedural ruling. *Id.* at 474.

### 9 III. DISCUSSION

10 This court dismissed the petition as unexhausted. The case was therefore dismissed on  
 11 procedural grounds. There is nothing in the record that would support a conclusion that jurists of  
 12 reason would find it debatable whether the petition states a valid claim of the denial of a  
 13 constitutional right and that jurists of reason would find it debatable whether this court was correct  
 14 in its procedural ruling. Petitioner's habeas claims were unexhausted in state court. Although  
 15 petitioner may ultimately be procedurally barred from presenting his claims in state court, this court  
 16 afforded him the opportunity to attempt to do so by dismissing the habeas petition without prejudice.  
 17 The Certificate of Appealability should therefore be denied.

18 Accordingly, it is hereby **ORDERED** that petitioner's motion for a Certificate of  
 19 Appealability (Dkt. 17) is **DENIED**.

20 The Clerk is directed to send uncertified copies of this Order to all counsel of record and to  
 21 any party appearing *pro se* at said party's last known address.

22 DATED this 3<sup>rd</sup> day of November, 2005.

23   
 24 Robert J. Bryan  
 25 U.S. District Judge  
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